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Utah Supreme Court

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### Recommended Citation

Brief of Appellant, *Wells Fargo Bank v. Midwest Realty and Finance Inc.*, No. 14028.00 (Utah Supreme Court, 2001).  
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IN THE SUPREME COURT OF THE STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

\* \* \* \* \*

WELLS FARGO BANK, N. A.,  
a Corporation,

Plaintiff and Respondent,

vs.

MIDWEST REALTY AND FINANCE INC.,  
a Corporation,

Defendant and Appellant.

Supreme Court No. 14028

\* \* \* \* \*

BRIEF OF APPELLANT

\* \* \* \* \*

An Appeal from the Judgment of the Third Judicial  
District Court in and for Salt Lake County, Utah

Honorable J. E. Banks, Judge

\* \* \* \* \*

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FILED

JUN 23 1975

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IN THE SUPREME COURT OF THE STATE OF UTAH

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WELLS FARGO BANK, N.A.,  
a Corporation,

Plaintiff and Respondent,

- vs -

Case No. 14028

MIDWEST REALTY AND FINANCE,  
INC., a Corporation,

Defendant and Appellant. :

---ooo0ooo---

BRIEF OF APPELLANTS

---ooo0ooo---

STATEMENT OF THE KIND OF CASE

Plaintiff brought this action seeking payment from the Defendant on a Promissory Note and an accounts receivable extension of credit. Plaintiff asserts liability on the part of the Defendant by reason of certain guarantys. (Exhibit P-3 and P-11.) Plaintiff alleges that there are separate continuing guarantys from Defendant to Plaintiff covering the Promissory Note and accounts receivable due Plaintiff from Lee Chair Corporation. Plaintiff alleged that Defendant failed to pay the amount due on Plaintiff's demand after Lee Chair defaulted on its debts. Defendant asserts that there was only one continuing guaranty and that pursuant to the terms thereof, it was revoked by a letter from Defendant to Plaintiff dated

July 6, 1971, and that Defendant was not liable to Plaintiff for the debts incurred after that date. (Exhibit P-6.)

#### DISPOSITION IN LOWER COURT

The District Court of Salt Lake County, Judge J. E. Banks, presiding without jury, ruled in favor of the Plaintiff, requiring Defendant to pay to Plaintiff \$59,000.00 principal on the Promissory Note dated February 4, 1972; \$8,874.26 principal on the accounts receivable credit line; \$5,000.00 attorney's fees; \$236.48 costs of court; interest on the Promissory Note of February 4, 1972, in the sum of \$17,116.02; and interest on the accounts receivable credit line in the sum of \$5,932.06, for a total sum of \$96,158.82, plus 8% interest per annum from January 22, 1975, until paid.

#### NATURE OF RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the judgment and dismissal of the action in its entirety or in the alternative, for reversal of the judgment with regard to all damages in excess of the \$59,000.00 principal on the promissory note dated February 4, 1972.

#### STATEMENT OF FACTS

On November 4, 1970, Midwest Realty and Finance, Inc. (hereafter "Defendant") executed and delivered to Wells Fargo Bank (hereafter "Plaintiff" or "Bank") a Continuing Guaranty prepared by Plaintiff to pay Plaintiff upon demand all indebtedness of Lees Chair Corporation (hereafter "Lee") and Richard Maggs, its President, up to \$60,000.00. (Exhibit P-3.) This

guaranty authorized the bank to "renew, extend or accelerate the terms of the indebtedness. . .without notice or demand. . ." to the guarantor and allowed the Bank to "permit the indebtedness to exceed guarantor's liability." The guaranty also specifically provided that:

"This guaranty shall not apply to any indebtedness created after actual receipt by Bank of written notice of its revocation as to future transactions."

On November 5, 1970, Plaintiff advanced to Lee the sum of \$60,000.00. In December, 1970, it became evident that Lee needed more than \$60,000.00 in credit. On December 17, 1970, Defendant executed and delivered to Plaintiff a continuing guaranty form prepared by Plaintiff in the amount of \$130,000.00. (Exhibit P-11.) Plaintiff thereafter made additional advances of funds to Lee. The terms of this guaranty were identical to the form executed and delivered on November 4, 1970.

The \$60,000.00 debt was renewed on February 11, 1971.

On July 6, 1971, a letter was mailed by Defendant to Plaintiff which stated in pertinent part that:

"During the recent meeting of the Board of Directors of Midwest Realty and Finance, we reviewed our financial commitments. It was the decision of the Board that we will withdraw the "Continuing Guaranty" of Midwest Realty & Finance, Inc. for and in behalf of L.E.E. Chair Corporation. This guaranty is dated December 17, 1970, and is in the amount of \$130,000.00."

"It is our desire that the guaranty be immediately reduced to the amount of the outstanding obligations covered by the L.E.E. Chair note. We believe this to be about \$85,000.00."

"We would appreciate your earliest reply, indicating any further requirements for finalizing this cancellation." (Exhibit P-6.)



Thereafter Wells Fargo Bank again renewed the \$60,000.00 debt on August 4, 1971, and September 22, 1971. (T.R. 34) On February 4, 1972, a new Promissory Note in the amount of \$59,000.00 was executed by the president of Lee Chair, Richard Maggs, in favor of Plaintiff, evidenced by a Promissory Note bearing that date (Exhibit P-2).

Contemporaneous with the Defendant's execution of the December 17, 1970 Guaranty, Lee executed a Continuing Security Agreement with the Plaintiff (Exhibit P-9). It provided, inter alia, that:

"Said security interest secures payment and performance of: all present and future indebtedness of Debtor to Bank; all obligations of Debtor and rights of Bank under this agreement; and all present and future obligations of Debtor to Bank of other kinds." (Paragraph 2.)

\* \* \* \* \*

"In accordance with customary accounting practice, Bank shall credit to such Promissory Notes or enter in Debtor's Loan Account all payments made by the Debtor on account of indebtedness evidenced by such Promissory Notes on Loan Account, all proceeds of collateral which are finally paid to Bank at its own office in cash or solvent credits, and other appropriate debts and credits." (Paragraph 4.)

\* \* \* \* \*

"While Debtor is not in default, Bank will, except to the amount of contingent liabilities secured hereby, either release or apply to a debt secured hereby, at Bank's option, all security in the form of cash or irrevocable bank credit. Any sums withheld to secure contingent liabilities may be deposited at Bank's option in a non-interest bearing account over which Debtor will have no control." (Paragraph 5.)

On July 6, 1971, the total credit extended from Plaintiff to Lee amounted to \$91,672.97, plus interest. Plaintiff continued after July 6, 1971, to rewrite and extend credit to Lee in the amount of \$280,931.90, while receiving monies in payment from Lee of approximately \$272,057.64, leaving a balance owing on August 16, 1973, of \$8,874.26. (Exhibit P-10.)

Plaintiff, through Walt Winrow, responded to Defendant's letter of July 6, 1971, by contacting John Wells, a director of Defendant, by telephone. (T.R. 13) Wells was not an officer of the Defendant. (T.R. 7) Winrow and Wells discussed the outstanding credit situations with regard to Midwest, Lee and Wells Fargo. From July 7, 1971 to September 21, 1972, no further action was taken with regard to the Continuing Guaranty. On September 21, 1972, Plaintiff wrote an information letter to Defendant, stating that Plaintiff had continued to extend credit and advances to Lee. Plaintiff stated in the letter that it considered the guaranty to still be in force with regard to a \$59,000.00 Promissory Note and the amounts outstanding on accounts receivable. Plaintiff made demand on Defendant to pay some \$91,500.00 on February 8, 1973,, (Exhibit P-14), and Plaintiff's attorney reiterated said demand on July 18, 1973, to which demands Defendant did not respond.

Plaintiff then commenced this action on August 13, 1973.

#### ARGUMENT

#### POINT I

THIS CASE IS ONE IN EQUITY AND THIS COURT MAY REVIEW BOTH ISSUES OF LAW AND FACT.

The Plaintiff in this action seeks payment from the Defendant based upon certain "Continuing Guarantys" of a debt incurred by Lee Chair. At issue is whether the first Continuing Guaranty was superseded by the second one. This issue is primarily concerned with the terms of the agreements and the conduct of the parties in relation thereto. The Defendant asserts that the two are at odds with one another.

Secondly, at issue is whether the Defendant cancelled the Continuing Guaranty. The Plaintiff maintains that it did not. The Defendant contends that it did.

Closely related to this is the issue of the Plaintiff's handling and allocation of funds on the Lee account after notice of cancellation. The Defendant maintains that the Plaintiff failed to act in good faith pursuant to the agreements of the parties and Lee.

As such, this case deals in equity. This Court may therefore review both issues of law and fact.

As set forth in McCullough v. Wasserback, 30 Utah 2d 398, 518 P. 2d 691 (1974), this Court has consistently held that:

In considering whether that standard of proof has been met we keep in mind that this is a case in equity in which this court may review the facts, yet do not lose sight of the prerogatives indulged the trial court; that even in equity cases his findings and judgment will not be disturbed unless the evidence clearly preponderates against them and a manifest injustice or inequity is wrought. But if these are seen to exist, this court may make its own findings and judgment to supersede those of the trial court.

It is the Court's prerogative and duty under the Constitution to review the evidence in equity cases and to modify or make new findings if the record compels it. First Security Bank of Utah v. Demiris, 10 Utah 2d 405, 354 P. 2d 97 (1960).

#### ARGUMENT

#### POINT II

THE CONTINUING GUARANTY OF DECEMBER 17, 1970, SUPERSEDED THE CONTINUING GUARANTY OF NOVEMBER 4, 1970.

The Defendant executed separate, identical forms prepared by Plaintiff and bearing the heading "Continuing Guaranty," to secure the indebtedness of Lee Chair Corporation. The first was executed November 4, 1970, (Exhibit P-3), and the second was executed December 17, 1970 (Exhibit P-11). The first document was to guaranty indebtedness up to \$60,000.00, which sums Plaintiff subsequently advanced to Lee. It later became evident that Lee required additional credit in excess of \$60,000.00. The second Guaranty form (Exhibit P-11) was executed by the Defendant to secure liabilities up to \$130,000.00. Contemporaneously, Lee executed the Continuing Security Agreement (Exhibit P-9). Plaintiff's total advancements to Lee never exceeded \$95,000.00.

The Continuing Guaranty Agreements state, inter alia, that:

"(1) For valuable consideration, the undersigned (hereinafter called Guarantors) jointly and severally unconditionally guarantee and promise to pay to WELLS FARGO BANK, N.A., a California Corporation (hereinafter called Bank), or order, on demand in lawful money of the United States, any and all indebtedness of Lee Chair Corporation and Richard Maggs (hereinafter called Borrowers) to Bank."

The document dated November 4, 1970, states:

"(2) The liability of Guarantors shall not exceed at any one time the sum of Sixty Thousand Dollars for principal, together with all interest on such part of the indebtedness as does not exceed aforesaid principal."

The document dated December 17, 1970, states as above except the principal sum is "One Hundred Thirty Thousand Dollars".

(2) goes on to state:

". . . .Notwithstanding the foregoing, Bank may permit the indebtedness of Borrowers to exceed Guarantors' liability. This is a continuing guaranty relating to any indebtedness, including that arising under successive transactions which shall either continue the indebtedness or from time to time renew it after it has been satisfied. This Guaranty shall not apply to any indebtedness created after actual receipt by Bank of written notice of its revocation as to future transactions. Any payment by Guarantors shall not reduce their maximum obligation hereunder, unless written notice to that effect be actually received by Bank at or prior to the time of such payment. The obligations of Guarantors hereunder shall be in addition to any obligations of Guarantors, or either of them, under any other guarantys of the indebtedness of Borrowers or any other persons heretofore given or hereafter to be given to Bank unless said other guarantys are expressly modified or revoked in writing; and this Guaranty shall not, unless expressly herein provided, affect or invalidate any such other guarantys. The liability of any Guarantor to Bank shall at all times be deemed to be the aggregate liability of said Guarantor under the terms of this Guaranty, and of any other guarantys heretofore or hereafter given by said Guarantor to Bank and not expressly revoked, modified or invalidated." (emphasis added)

\* \* \* \* \*

"(4) Guarantors authorize Bank, without notice or demand and without affecting their liability hereunder, from time to time to (a) renew,

extend, accelerate or otherwise change the time for payment of, or otherwise change the terms of the indebtedness or any part thereof, including increase or decrease of the rate of interest thereon; (b) take and hold security for the payment of this Guaranty or the indebtedness guaranteed, and exchange, enforce, waive and release any such security; (c) apply such security and direct the order or manner of sale thereof as Bank in its discretion may determine; and (d) release or substitute any one or more of the endorsers or guarantors. Bank may without notice assign this Guaranty in whole or in part. (emphasis added)

"(5) Guarantors waive any right to require Bank to (a) proceed against Borrowers; (b) proceed against or exhaust any security held from borrowers; or (c) pursue any other remedy in Bank's power whatsoever. Guarantors waive any defense arising by reason of any disability or other defense of Borrowers or by reason of the cessation from any cause whatsoever of the liability of Borrowers. Until all indebtedness of Borrowers to Bank shall have been paid in full, even though such indebtedness is in excess of Guarantors' liability hereunder, Guarantors shall have no right of subrogation, and waive any right to enforce any remedy which Bank now has or may hereafter have against Borrowers, and waive any benefit of, and any right to participate in any security now or hereafter held by Bank. Guarantors waive all presentments, demands for performance, notice of non-performance, protests, notices of protest, notices of dishonor, and notices of acceptance of this Guaranty and of the existence, creation, or incurring of new or additional indebtedness."

Certain provisions of the agreements as quoted above, when considered in context of the course of conduct of the parties, clearly indicate that they intended the second Guaranty to supersede the first.

Paragraph (2) of the Continuing Guaranty form states:

"The obligations of Guarantors hereunder shall be in addition to any obligations of Guarantors, or either of them, under any other guaranties of the indebtedness of Borrowers or any other persons

heretofore given or hereafter to be given to Bank unless said other guaranties are expressly modified or revoked in writing; and this Guaranty shall not, unless expressly herein provided, affect or invalidate any such other guaranties;. . ."

However, the law is clear that the course of conduct of the parties to a written agreement can modify an express term of that agreement. In the case of Tucker Sales Corporation v. Potter, 104 Utah 1, 137 P.2d 270, 1943, the Court stated as follows with regard to the construction of a contract:

"On the other hand, the court's construction is that given the contract by the parties themselves. From October 1, 1938, when the contract was entered into, until August 1941, almost three years, the partnership furnished plaintiff with duplicate slips and paid without question plaintiff's commission on all coal sold. Appellants first raised this question on October 6, 1941. Nothing could show the intention of the parties more clearly than the interpretation they themselves place upon a contract. It is well settled in this state that where the parties to a contract, with full knowledge of the terms thereof, by their actions before any controversy has arisen, place upon it a construction which is not contrary to the usual meaning of the language used the courts will follow that construction.

(See also Fowers v. Lawson, 56 Utah 420, 191 P. 227; Roberts v. Tuttle, 36 Utah 614, 105 P. 916; Titton v. Sterling Coal & Coke Co., 28 Utah 173, 77P. 758, 107 Am. St. Rep. 689; Snyder v. Fidelity Savings Association, 23 Utah 291, 64 P. 870; Woodward v. Edmonds, 20 Utah 118, 57 P. 848; Peay v. Salt Lake City, 11 Utah 331, 40 P. 206.)

In the case of Hodges Insurance Co., v. Swan Creek Canal Co., 111 Utah 405, 181 P.2d 217, 1947, the court stated:



"A practical construction of the terms of a contract by the parties thereto implies a mutual and identical interpretation."

The Court goes on to quote 17 C.J.S., "Contracts,"

Section 325, Subdivision 5, Page 765, as follows:

"To warrant the court in according great weight, or adopting, a practical construction by the parties, it is necessary and sufficient that each party shall have placed the same construction on the contract. While the construction placed by one party on his own language in a contract is the highest evidence of his own intention, the meaning of the contract cannot be established by the construction placed on it by one of the parties, unless such interpretation has been made to and relied on by the other party, or has been known to and acquiesced in by the other party, . . . ."

In this case, both the parties put the same construction on the terms of the guaranty dated December 17, 1970, i.e. that guaranty superseded the guaranty of November 4, 1970.

In the case of Bullough v. Sims, 16 U.2d 304, 400 P.2d 20, 1965, quoting the California Supreme Court, this Court said:

"Appellants correctly claim that this doctrine of practical construction can only be applied when the contract is ambiguous, and cannot be used when the contract is unambiguous. That is undoubtedly a correct general statement of the law. (Citations omitted). But the question involved in such cases is ambiguous to whom? Words frequently mean different things to different people. Here the contracting parties demonstrated by their actions that they knew what the words meant and were intended to mean. Thus, even if it be assumed that the words standing alone might mean one thing to the members of this court, where the parties have demonstrated by their actions and performance that to them the contract meant something quite different, the meaning and intent of the parties should be enforced. In such a situation the parties by their actions have created the "ambiguity" required to bring the rule into operation. If this were not the rule the courts would be enforcing one contract when both parties have demonstrated that they meant and intended the contract to be quite different."



(Subsequently restated in Bullfrog Marina, Inc. v. Lentz, 28 U.2d 261, 501 P.2d 266, 1972.)

In the present action, there are ambiguities in the Guaranty Agreement when considered in light of the subsequent conduct of the parties. The law is that ambiguities be resolved against the maker of the instrument, or in cases in which the parties have put an interpretation on the ambiguity the court should apply the construction applied by the parties themselves. The parties both treated the debt and guaranty as if there was only one guaranty. Only upon commencement of this action has Plaintiff begun to refer to two guaranties.

At the trial, G. R. Harmon, President of Defendant, testified that the guaranty of December 17, 1970, was intended to replace or supersede the first guaranty, and that Defendant never intended to be obligated for debts of Lee in excess of \$130,000.00 (T.R. 64). The Security Agreement executed by Plaintiff and Lee (Exhibit P-9) and all of the letters between the parties, which are Exhibits P-6, P-8, P-13, and P-14, and the minutes of Defendant, (Exhibit P-1), all show that both parties refer only to one continuing guaranty and rely only on one continuing guaranty between them.

The continuing Security Agreement, executed between Plaintiff and Lee contemporaneous with the December 17, 1970, guaranty, on December 18, 1970, secures (Paragraph 2) "All present and future indebtedness of Debtor (Lee) to Bank; all obligations of Debtor and rights of bank of other kinds." The

Security Agreement terminates (Paragraph 3) only "upon payment of all indebtedness and performance of all obligations existing when Bank receives written notice of withdrawal of this Agreement by Debtor." The Security Agreement treats all obligations of Lee (guaranteed by Defendant) as one liability, including the \$60,000.00 originally advanced and later advancements.

Defendant's letter of July 6, 1971, to Plaintiff states:

"During the recent meeting of the Board of Directors of Midwest Realty and Finance, we reviewed our financial commitments. It was the decision of the Board that we will withdraw the "Continuing Guaranty" of Midwest Realty and Finance, Inc. for an in behalf of L.E.E. Chair Corporation. This guaranty is dated December 17, 1970, and is in the amount of \$130,000.00.

"It is our desire that the guaranty be immediately reduced to the amount of the outstanding obligations covered by the L.E.E. Chair Note. We believe this to be about \$85,000.00.

"We would appreciate your earliest reply, indicating any further requirements for finalizing this cancellation."

This letter states unequivocally that the company will withdraw the continuing guaranty of Defendant for Lee, and then refers to that guaranty as dated December 17, 1970, and as being in the amount of \$130,000.00. The letter refers to the guaranty in the singular and speaks of a single sum liability of \$85,000.00. It is obvious that Defendant was referring to one guaranty as inclusive of the total debt. Indeed, this is the only reasonable interpretation that can be placed upon this language when one considers the knowledge of the Plaintiff as to the total indebtedness outstanding at the time.

Plaintiff's letter of September 21, 1972, to Defendant states that it is Plaintiff's position that Defendant's guaranty was still in effect. It speaks of one guaranty as follows:

"In regard to your guarantee, I am enclosing a copy for your records in the event you might not have one. Our position, simply stated, is that we have felt and continue to feel that you guaranteed these loans. As to your letter of July 6, 1971, we have discussed this with Mr. Winrow and he stated that according to his conversation with Mr. Wells, the intent of the letter was to 'cap' the borrowing which was done. We, therefore, contend that you in fact do guaranty Lee Chair's indebtedness to Wells Fargo Bank." (emphasis added)

Plaintiff's letter of February 8, 1973 to Defendant is a demand letter for payment of Lee's indebtedness. (Exhibit P-14.) That letter states, inter alia, that:

"At the present time, the following is owed by Lee Chair:

Promissory Note	\$59,000.00
Interest paid to February 25, 1972	

Accounts Receivable Financing	\$32,500.00
Interest paid to March 25, 1972	

Obviously, further forbearance on the part of the bank is unfeasible. Therefore, we are making formal request for payment of these obligations under the terms of the Continuing Guaranty you executed on December 17, 1970." (emphasis added)

This letter clearly evidences that up until the institution of this action, the Plaintiff also treated the indebtedness of Lee as being covered by one guaranty, the one of December 17, 1970. (Exhibit P-11.) Only upon institution of this action did the Plaintiff apparently find it advantageous to treat the Lee indebtedness separately.

In addition to these letters, the Defendant's minutes of June 22, 1972, and of August 14, 1973 refer to only one guaranty of the debts of Lee from Defendant to Plaintiff.

(Exhibit P-1.)

It should also be noted that the Plaintiff's accounts card, (Exhibit P-10), from February, 1971, until July, 1971, illustrate that the accounts were guaranteed by a guaranty from Defendant dated December 17, 1970. After July, 1971, and receipt of Defendant's letter of cancellation (Exhibit P-6) Plaintiff no longer showed any guaranty on the accounts until May of 1972, when Plaintiff began to show a guaranty from R. Maggs of Lee Chair Company on its accounts.

Plaintiff never in all its course of dealing with Lee and Defendant allowed the credit extended to Lee to exceed the \$130,000.00 limits of the December 17, 1970 guaranty. In fact, it never exceeded \$95,000.00 (T.R. 66). The course of conduct of Plaintiff as well as Defendant shows that both parties intended that the guaranty of December 17, 1970, supersede the guaranty of November 4, 1970, and both parties acted in reliance upon that fact up until the time that this action was commenced.

### POINT III

THE CONTINUING GUARANTY FROM DEFENDANT TO PLAINTIFF WAS REVOKED AS TO ALL FUTURE TRANSACTIONS AND EXTENSIONS OF CREDIT BY THE LETTER FROM DEFENDANT TO PLAINTIFF DATED JULY 6, 1971.

The continuing guaranty form used by Plaintiff, which was executed by Defendant in the November 4, 1970, transaction and the December 17, 1970, transaction, states in Paragraph (2) that:

"This guaranty shall not apply to any indebtedness created after the actual receipt by Bank of written notice of its revocation as to future transactions."

The letter of July 6, 1971 (Exhibit P-6) from Defendant to Plaintiff states that:

"During the recent meeting of the Board of Directors of Midwest Realty & Finance, we reviewed our financial commitments. It was the decision of the Board that we will withdraw the 'Continuing Guaranty' of Midwest Realty & Finance, Inc. for and in behalf of Lee Chair Corporation. This guaranty is dated December 17, 1970, and is in the amount of \$130,000.00.

"It is our desire that the guaranty be immediately reduced to the amount of the outstanding obligations covered by the Lee Chair note. We believe this to be about \$85,000.00.

"We would appreciate your earliest reply indicating any further requirement for finalizing this cancellation. (Emphasis added)

As of the date of this letter, Defendant was obligated to Plaintiff for the outstanding balance of credit extended to Lee pursuant to Defendant's continuing guaranty to Plaintiff. Defendant clearly stated that it was withdrawing and cancelling the continuing guaranty with regard to any transactions after the date of the letter. Defendant's cancellation was pursuant to and in accordance with the terms of the continuing guaranty executed by the parties.

Plaintiff made no official response to the letter of cancellation until September 21, 1972 when Plaintiff wrote an information letter to Defendant (Exhibit P-8) stating Plaintiff's position with regard to the guaranty as follows:

"Lee Chair Corporation is presently indebted to Wells Fargo Bank in the amount of \$77,461.86. This is broken down as follows: \$59,000.00 unsecured note and \$18,461.86 in the form of accounts receivable financing. The accounts receivable line is still in effect so that balance may fluctuate. However, the maximum has been capped at \$32,500.00. We have continued to allow this borrowing because if we cease to allow it, it would result in the closing of the business, thereby eliminating any possibility of their repaying the other note. As you can see, the accounts receivable line is being used properly by Mr. Maggs. . . ."

"Our position, simply stated is that we have felt and continue to feel that you guaranty these loans. As to your letter of July 6, 1971, we have discussed this with Mr. Winrow and he stated that according to his conversation with Mr. Wells, the intent of the letter was to cap the borrowing which was done. We, therefore, contend that you in fact do guaranty Lee Chair's indebtedness to Wells Fargo Bank."

In this letter and in the letter of February 8, 1973, Plaintiff attempts to explain why it continued to extend credit to Lee even though they had notice since July 6, 1971, of Defendant's cancellation. In the letter of February 8, 1973, Plaintiff stated:

"This company is in serious difficulty at the present time. We have allowed the Accounts Receivable line to remain open (maximum advance \$32,500.00) in order to allow the company's continued operation and to assist Mr. Maggs in his attempts to find a solution to the firm's financial difficulties."

The explanations advanced to Defendant in these two letters indicate no reliance on the guaranty in extending this additional credit, and no prior notice to Defendant, but rather a business decision on the part of Plaintiff, for which Defendant should not be held responsible. This kind of business decision made on the part of Wells Fargo Bank should have no effect on the Continuing Guaranty entered into between Defendant and Plaintiff. Plaintiff continued to extend credit to Defendant without any written authorization of any kind. Further extension of credit after the cancellation letter of July 6, 1971 is beyond the obligation incurred by Defendant in executing the Continuing Guaranty of December 17, 1970 as set forth by the specific language of the Agreement, to-wit:

"This guaranty shall not apply to any indebtedness created after actual receipt by Bank of written notice of its revocation as to future transactions" (Paragraph 2)

The Bank acknowledges receipt of Defendant's letter of July 6, 1971, which states:

". . . we will withdraw the 'Continuing Guaranty' of Midwest Realty & Finance, Inc. for and in behalf of Lee Chair Corporation."

Plaintiff had notice of Defendant's cancellation pursuant to the terms of the guaranty, yet they continued to extend credit to Lee. Defendant is not liable for any such extension of credit after July 6, 1971.

G. R. Harmon was the only party with authority to cancel or modify the cancellation pursuant to action of the Board of Directors of Defendant. The letter of cancellation was

signed by Mr. Harmon (Exhibit P-6), and all agreements were signed by Mr. Harmon (Exhibits P-3 and P-11). At the trial, Plaintiff introduced evidence that a director of the Defendant, John Wells, had authorized "capping the accounts receivable line at \$35,000.00." That evidence, in the form of notes scribbled on a letter pursuant to a telephone conversation, was admitted as an exception to the hearsay rule (T.R. 40). Defendant contends that the evidence was wrongfully admitted because they were not identified by the person who ostensibly took the notes, they were not taken in the regular course of business of the bank, and the method and circumstances of their preparation was not such as to indicate their trustworthiness. In addition there was insufficient foundation as to witnesses ability to recognize the writing. (T.R. 38-40)

Finally, Wells, as a director of Defendant, had no authority to authorize "capping" of any credit extensions. Mr. Wells also testified that he did not authorize any such action (T.R. 17, 19). At 34 A.L.R. 2d 290, Authority Of Officers or Agent to Bind Corporation as Guarantor or Surety, states:

"But individual directors have no authority even in connection with a contract authorized by vote of the board, to add a guaranty to it in order to facilitate its performance."

19 Am. Jur. 2d, Corporations, Section 1120, states:

"As a consequence, a single director of a corporation as such has no power to act in a representative capacity for the corporation. ."



Such was the case with regard to the telephone conversation between Plaintiff's officer and John Wells. Plaintiff cannot rely on that conversation as any authority for its continued extension of credit to Lee being guaranteed by Defendant. This is especially true when Plaintiff had always dealt only with Harmon. Plaintiff knew Harmon was president and had authority to act for the Defendant.

The conversation was the only evidence propounded by the Plaintiff to support its position that it was authorized by the Defendant to "cap" the guaranty rather than "cancel" the guaranty as called for in the Defendant's letter to the Plaintiff (Exhibit P-6). Even if one assumes that Mr. Wells did indicate the intent was to "cap" the account, he clearly had no authority to act for the Defendant corporation and could not alter the terms of the letter.

Thus, the lower Court's conclusions and findings in this regard constituted prejudicial error requiring reversal of its decision herein.

#### POINT IV

DEFENDANT IS NOT LIABLE FOR ANY CREDIT EXTENDED TO LEE BY PLAINTIFF AFTER JULY 6, 1971.

After July 6, 1971, the Plaintiff extended funds to Lee Chair in the total amount of \$280,931.90, and received from Lee monies in payment of those funds advanced of approximately \$272,057.64, leaving a balance owing from Lee to Plaintiff on August 16, 1973, of \$67,874.26 (Exhibits P-10 and P-16). Plaintiff claims that Defendant is liable for said debt.

38 Am. Jur. 2d, Guaranty states:

". . .the offer to guaranty future obligations may be revoked by the guarantor, at least in the absence of a contrary provision in the guaranty instrument, with the result that the guarantor will not be liable to the creditor on the latter's extension of credit to the debtor subsequent to the receipt of notice of revocation."

It should further be noted that:

"Where a guaranty is continuing in character. . . , it may be withdrawn on notice and the guarantor will not be affected by any transaction between the principal obligor and the guaranty subsequent to the notice." (Duration of a Continuing Guaranty, 81 A.L.R. 795.)

"A guaranty does not cover renewals, after revocation of claims within coverage at the time of revocation." (Guaranty as Covering Renewals, After Revocation of Claims Within Coverage at Time of Revocation, 100 A.L.R. 1236.)

The terms of the Continuing Guaranty itself (Exhibit P-11) specifically provides that:

"This Guaranty shall not apply to any indebtedness created after actual receipt by Bank by written notice of its revocation as to future transactions." (Paragraph 2)

It is clear that sums substantially in excess of the amount outstanding on the date of cancellation were received and credited to Lee's account subsequent to that cancellation. It is also clear that the Plaintiff chose to advance additional funds to Lee in "future transactions".

There was no agreement between Plaintiff and Defendant to "cap" the accounts receivable financing between Lee and Plaintiff. Indeed no officer of Defendant corporation ever spoke with any employee or officer of Plaintiff corporation about capping of any financing between Lee and Plaintiff (T.R. 17, 18, 19).

Plaintiff was on notice that Defendant would not guaranty any future transactions between Lee and Plaintiff as of July 6, 1971. In spite of this, Plaintiff continued to advance credit to Lee and receive payments from Lee without applying those payments to the total outstanding debt of Lee guaranteed by the Defendant, including the advance of \$60,000.00. By so doing, Plaintiff failed to act in good faith with regard to the guarantor of the credit advanced to Lee between November 4, 1970 and July 6, 1971.

In the case of Powerine Co. v. Russell's, Inc., 103 Utah 441, 135 P.2d 906, 1943, the Court, in stating the rules of construction for letters of credit and guarantys, stated:

"Giving rules for construction of letters of credit or guaranty, the court says in Marshall-Wells Co. v. Tenncy, or guaranty are contracts of an extensive use in the commercial world, and upon the faith of which large credits and advances are made. A letter of credit should not receive a strict and technical interpretation, but a fair and reasonable one, according to the true import of its terms, and what may be fairly presumed to have been the intention and understanding of the parties, with a view to the furtherance of its spirit, and in order to attain the object designed. . . . "

"In Lamborn v. National Park Bank, 212 App. Div. 25, 208 N.Y.S. 428, 436, the Court construed together several different letters between the parties, and made a letter of credit out of them. Giving the rules of construction for contracts, as they are applied to letters of credit, the Court said: 'answer to the appellant's contention that, by taking the three letters. . . . together, the letter of credit was accepted by Lamborn & Co.. . . is found in the rule that the bank's writings must be taken most strongly against it, and must be construed so as to be reasonable and consistent, and their intent deemed to have been an honorable and honest one.'

(See also Doelger v. Battery Park Nat. Bank, 201 App. Div. 515, 194 N.Y.S. 582; Gillet v. Bank of America, 160 N.Y. 549, 55 N.E. 292; Schneider v. Victor, 208 App. Div. 624, 203 N.Y.S. 897.)

Quoting from Gillet v. Bank of America, supra, the Court said:

"If there is any uncertainty or ambiguity as to the meaning of the agreement, it should be resolved in favor of the Plaintiff, as it was the Defendant who prepared this contract. If there is any doubt as to the meaning of the terms employed, the Defendant is responsible for it, as the language is wholly its own."

Thus, in Powerine, supra, this Court required that the acts of the parties be deemed to be reasonable and honest and that the parties act in good faith with each other pursuant to a guaranty, and the Court indicated that in determining the intent of the parties that reasonable and honest intentions be assumed. This would require Plaintiff to use the first in-first out accounting principles required by the language of the Continuing Security Agreement executed between Plaintiff and Lee (Exhibit P-9) which states:

"In accordance with customary and accounting practice, Bank shall credit to such promissory notes or enter in Debtor's Loan Account all payments made by the Debtor on account in indebtedness evidenced by such promissory notes on Loan Account, all proceeds of collateral which are finally paid to Bank at its own office in cash or solvent credits, and other appropriate debits and credits." (Paragraph 4)

Additionally, the Plaintiff specifically included in Paragraph (4) of the Continuing Guaranty (Exhibit P-11) that:

"Guarantors authorize Bank, without notice or demand and without affecting their liability hereunder

from time to time to (a) renew, extend, accelerate or otherwise change the time for payment of, or otherwise change the terms of the indebtedness or any part thereof, including increase or decrease of the rate of interest thereon; (b) take and hold security for the payment of this Guaranty or the indebtedness guaranteed, and exchange, enforce, waive and release any such security; (c) apply such security and direct the order or manner of sale thereof as Bank in its discretion may determine; and (d) release or substitute any one or more of the endorsers of guarantors. Bank may without notice assign the Guaranty in whole or in part. (Emphasis added)

It should again be noted that these two instruments were executed by Lee and the Defendant contemporaneously. When considered in light of these circumstances, the Plaintiff failed to make any good faith effort to apply funds received by virtue of the Continuing Security Agreement to the debt guaranteed by the Defendant regardless of the specific language of its Continuing Guaranty authorizing it to do so.

After notice of the withdrawal of the continuing guaranty, Plaintiff was, in good faith, required to apply the payments made by Lee to its outstanding debt. Plaintiff made the decisions that Lee Chair Corporation would be better able to pay off the \$60,000.00 note if they continued to extend credit on the accounts receivable line. Plaintiff should not be allowed to take such a course of action based on its business decision and at the same time hold Defendant to a guaranty which was cancelled as to future transactions as of July 6, 1971. After said notice, Plaintiff had a duty to Defendant to apply all receipts to payment of Lee's debts which were guaranteed by the Defendant.

#### POINT V

IF THE COURT TREATS THE LEE OBLIGATIONS AS SEPARATE DEBTS, THEN THE DEFENDANT WOULD STILL BE ABSOLVED OF LIABILITY THEREON.

In considering the promissory note (Exhibit P-2) it should be noted that this Court has held that whether or not a new note is given in payment of the original note, or simply as an extension of the earlier debt is "a question to be determined by ascertaining the intention of the parties as manifested by the facts and circumstances attending their transactions."

(Gray v. Kappos, 90 Utah 300, 61 P.2d 613, 1936, and Interstate Trust Co. v. Headlund, 51 Utah 543, 171 P. 515, 1918.) In the instant case, Lee and Plaintiff in executing the new note for a sum less than the original \$60,000.00 debt and Plaintiff by surrendering the original note, evidenced an intent that the new note was in payment of the old debt, and, since the execution of the new note was subsequent to Defendant's letter cancelling the Continuing Guaranty, Defendant is not liable on that note.

In Merchants National Bank v. Cressey, 164 Iowa 721, 146 N.W. 761 (1914), where a guaranty was an issue which covered loans and advances, including renewals without notice and provided for termination of thirty days written notice, much the same as the guaranty in the instant case, it was held:

"The guarantor was not liable on the renewal of the note executed before the notice was given, when the renewal was made more than thirty days

after the revocation. . .It cannot be said that this in any way lessened the right of the bank in its enforcement of the obligation against him, for with notice of his withdrawal it could yet rely upon the existing evidence of the indebtedness made before such notice. In accepting the renewal after such notice, it thereby elected to be bound by his notice of withdrawal, and is presumed to have relied upon the security existing at the time of the renewal: (100 A.L.R. 1237.)

In Re: Kelly (1913) 73 Mich. 492, 139 N.W. 250, Annotated Cases (1914) 848, the Court held that:

"Renewals of 90-day notes after revocation of guaranty even in the form of a demand note are not covered by the guaranty, even if the demand note be regarded as a continuing security for a succession of notes to the payee." (100 A.L.R. 1237)

On February 4, 1972, Plaintiff and Lee executed a renewal note for the sum of \$59,000.00. This created a new obligation not enforceable until May 4, 1972. In so acting to create a new obligation after notice and receipt of Defendant's letter of cancellation, Plaintiff relieved Defendant of its obligation under the continuing guaranty to guarantee the debts this case, the original note was surrendered upon execution of the new note. In 11 Am. Jur. 2d, Bills and Notes, Section 918, it states:

"The surrender of the original note upon receiving a renewal has been held to indicate that the renewal note was accepted as payment or novation with intent to discharge the original. . . ."

In the annotation titled "Renewal Note as Discharging Original Obligation or Indebtedness," 52 A.L.R. 1416, it states that:



"It has been held in several jurisdictions that the delivery back of the original note is presumptive evidence that the renewal note is accepted as payment."

With regard to the accounts receivable line of credit, counsel refers the Court to the arguments contained in Point III. The arguments contained therein clearly absolve the Defendant of liability on the account receivable line of credit.

#### POINT VI

IF THE COURT HOLDS THAT THE SECOND CONTINUING GUARANTY DID NOT SUPERSEDE THE FIRST CONTINUING GUARANTY AND THAT THE DEFENDANT IS LIABLE FOR THE DEBT EVIDENCED BY THE PROMISSORY NOTE, THEN THE DEFENDANT WOULD STILL BE ABSOLVED OF LIABILITY ON THE ACCOUNTS RECEIVABLE LINE OF CREDIT.

The Defendant cancelled the Continuing Guaranty Agreement of December 17, 1970 (Exhibit P-11) by its letter of July 6, 1971 (Exhibit P-6). There is no competent evidence that there was any intent by the Defendant to do otherwise. Pursuant to the terms of the Continuing Guaranty Agreement (Exhibit P-11) the liability of the Defendant would not be extended to future transactions after receipt of notice of cancellation.

After receipt of this cancellation, the Plaintiff proceeded to extend additional credit to Lees as well as receive substantial amounts of funds which were credited to Lee's accounts receivable credit line (Exhibit P-10).

The arguments contained in Point III clearly demonstrate to the Court that the amount finally left outstanding on the



accounts receivable line of credit was a sum which resulted from advances of credit after notice of cancellation of the Continuing Guaranty. By its terms, said Continuing Guaranty absolved the Defendant from liability for this indebtedness of Lees.

Therefore, the judgment of the lower Court against the Defendant should be reversed as it relates to the amounts outstanding on the accounts receivable line of credit to Lee's.

#### CONCLUSION

The judgment of the lower Court against the Defendant should be reversed and judgment entered for the Defendant dismissing Plaintiff's complaint no cause of action.

The lower Court's ruling that the Defendant did not intend to cancel the Continuing Guaranty was not supported by a competent evidence. To the contrary, the evidence clearly demonstrated that the Defendant's letter of July 6, 1971, was a notice of cancellation pursuant to the terms of the Continuing Guaranty. Therefore, the subsequent transactions of credit extensions to Lees were not covered by any Guaranty from the Defendant.

Alternatively, the judgment of the lower Court should be reversed with regard to all damages in excess of the \$59,000 principal on the promissory note dated February 4, 1972.

Respectfully submitted,

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